Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of the Commission's	)	
Rules to Ensure Compatibility	)	CC Docket No. 94-102
With Enhanced 911 emergency	)	
Calling Systems	)	
	)	
Phase II Compliance Deadlines	)	
For Non-Nationwide CMRS Carriers	)	

OPPOSITION OF APCO, NENA AND NASNA TO THE ALLTEL COMMUNICATIONS, INC., DOBSON CELLULAR SYSTEMS, INC. AND AMERICAN CELLULAR CORPORATION PETITIONS FOR RECONSIDERATION

The Association of Public-Safety Communications Officials-International, Inc. ("APCO"), the National Emergency Number Association ("NENA"), and the National Association of State Nine One One Administrators ("NASNA") (collectively, "Public Safety Organizations") oppose the Petitions for Reconsideration filed by ALLTEL Communications, Inc. ("ALLTEL"), Dobson Cellular Systems, Inc. ("Dobson") and American Cellular Corporation ("ACC") (collectively "Petitioners")[1] of the Commission's *Order to Stay* in the captioned matter, FCC 02-210, released July 26, 2002. The Petitioners are dissatisfied with the Commission's proposed referral to the Enforcement Bureau of non-nationwide carriers who fail to meet the new interim E9-1-1 Phase II performance benchmarks.

[1] Petition for Reconsideration of ALLTEL Communications, Inc. and Joint Petition for Reconsideration of Dobson Cellular Systems, Inc. and American Cellular Corporation filed on August 26, 2002.

The Petitioners assert they should be afforded the opportunity to demonstrate why noncompliance should be excused before the Commission deems a carrier in noncompliance with the *Order to Stay* (ALLTEL, 1, 3-6) (Dobson/ACC, 2-9). The petitions must be dismissed because the FCC has a duty to enforce its regulations, particularly where the carriers have negotiated and agreed to comply with the regulations by a specific date. Additionally, referral to the Enforcement Bureau for noncompliance may not necessarily result in an imposition of a penalty.[2]

The Petitioners complain that the Commission has adopted a strict liability standard, and thus has foreclosed future consideration of the potential inability of carriers to obtain the necessary Phase II equipment from their vendors. In fact, the Commission did no more than warn the Petitioners and similarly situated carriers that it would treat a failure to satisfy waiver conditions in the same manner as a rule violation, and that such violation would be subject to possible enforcement action. The firm language of the *Order to Stay* was obviously intended as a warning that the time has come for carriers to comply, and that, absent extraordinary circumstances, further extensions and waiver would not be granted.

The stay granted to the Petitioners is expressly conditioned on its meeting certain alternative benchmarks for deployment of Phase II technology. The Commission made clear that these conditions "have the same force and effect as a Commission rule itself." *Order to Stay* at ¶36. Therefore, as is the case with any potential rule violation, "to the extent a carrier fails to satisfy any condition or Commission rule, it will be subject to

[2] Petitioners' arguments are nearly identical to those raised in pending Petitions for Reconsideration of the separate waiver orders relevant to Nextel, Cingular, and Verizon. Thus, this Opposition will reiterate the Public Safety Organizations' prior responses (filed December 19, 2001) to those pending Petitions.

possible enforcement action, including but not limited to revocation of the relief, a requirement to deploy an alternative ALI technology, letters of admonishment or forfeitures." *Id*. (emphasis added). The Commission did not state that there *would* be such enforcement action, but rather that enforcement action was *possible*." Perhaps the Commission has authority to impose automatic penalties for prospective noncompliance, but that is not what it did in this proceeding, despite Petitioners' claims to the contrary.

Petitioners point, however, to Commission's statement that if "any carrier does not have compliant Phase II service available on the dates set forth herein, it will be deemed noncompliant and referred to the Commission Enforcement Bureau for possible action." *Order to Stay* at ¶37. Here again, however, the Commission was simply restating its standard authority to address noncompliance through enforcement procedures with the *possibility* of sanction. The Commission clearly left the door open that noncompliance would not result in any sanction.

Petitioners seem particularly concerned, nevertheless, by the Commission's additional comment that "an assertion that a vendor, manufacturer or other entity was unable to supply compliant products will not excuse noncompliance." *Id*. Yet, that is always the case with Commission rule enforcement. Regulated entities are not excused from rule compliance merely because equipment necessary for compliance is unavailable from a vendor.[3] Rather, that is one ground for a possible waiver (as Petitioners and others have been granted) or may be a mitigating factor in determining whether a sanction for noncompliance is necessary. It does not however eliminate the

[3] For example, an owner of a radio transmitting tower is not excused from compliance with the Part 17 tower painting and lighting requirements merely because its vendor could not deliver the necessary parts or services in a timely fashion. That might, however, lead to mitigation of the sanction.

noncompliance. That is exactly what the Commission did in this case, stating that "a carrier's 'concrete and timely' actions taken with a vendor, manufacturer, or other entity may be considered as possible mitigation factors in such an enforcement context." *Id*.

Petitioners also argue incorrectly that the Commission is depriving them of an opportunity to respond to a claim of noncompliance prior to the imposition of a sanction. First, a finding of noncompliance in this instance will be based on the Petitioners' own Quarterly Reports (supported by affidavit) which will indicate whether they have or have not met the objective benchmarks adopted as conditions to their waivers. Petitioners will thus have ample opportunity to demonstrate whether or not they are in compliance. Second, if the Quarterly Reports do not demonstrate compliance, Petitioners will still have an opportunity to address mitigating factors that may affect the imposition of a sanction. The Commission made clear that noncompliance will result in referral to the Enforcement Bureau for *possible* action. The Enforcement Bureau in turn will conduct any necessary investigation and recommend sanctions, if any, based upon relevant Commission rules with appropriate notices and opportunities for the Petitioners' participation. In particular, the carriers will be free to provide evidence that it took "concrete and timely action with its vendors" and, as the Commission made clear in the *Order to Stay*, such evidence may be considered as possible mitigation factors.

APCO, NENA, and NASNA have repeatedly expressed concerns in all the waiver proceedings that the seemingly endless stream of extensions of time and waiver requests could lead to complacency among some carriers. Rather than an all-out effort to comply, some carriers may give priority to economic and business planning concerns, confident that any Phase II implementation requirements are "soft deadlines," and that

noncompliance will be without serious consequences. Now, the Commission has wisely made clear that further waivers will not be granted "absent extraordinary circumstances" and that noncompliance will not be excused by a vendor's or manufacturer's failure to deliver. However, contrary to the Petitioners' claims, the Commission has not heartlessly closed off their ability to provide a reasonable explanation for noncompliance. Assuming that the Petitioners take "concrete and timely" action with regard to a vendor or manufacturer, those actions will be considered in mitigating any actual sanction.

For the reasons discussed above, the Commission should dismiss the Petitioners' petitions for reconsideration and uphold its *Order to Stay*.

Respectfully submitted,

APCO, NENA AND NASNA

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October 16, 2002

CERTIFICATE OF SERVICE

I, Stella Hughes, a secretary in the law firm of Shook, Hardy & Bacon, L.L.P., hereby certify that I caused a copy of the foregoing "Opposition of APCO, NENA and NASNA to the ALLTEL Communications, Inc., Dobson Cellular Systems, Inc. and American Cellular Corporation Petitions for Reconsideration" to be served on the following parties by first-class postage-paid U.S. mail.

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